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DISCRIMINATION LAW

Equality in the Private Sector

2002-2003

Volume 1

Instructor: Joanne Rosen

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DISCRIMINATION LAW: EQUALITY IN THE PRIVATE SECTOR
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NOTE: The antidiscrimination provisions of the Ontario Human Rights Code effectively created a new cause of action. Central to such an undertaking is a substantive account of the nature of the wrong - the interest to be protected and the kind of behaviour that counts as wrongful. Yet, as Judith Keene points out (*Human Rights in Ontario*, 2nd edn., Toronto: Carswell, 1992, p. 5), the Ontario Code does not define "equal treatment without discrimination", the cornerstone concept of discrimination law. This has left it up to adjudicators - Boards of Inquiry and judges - to fashion an account of what makes behaviour discriminatory and therefore unlawful.

Part of the debate has centred around whether "intent" is required to establish discrimination or whether it can be defined in terms of effects. This chapter of the materials is designed to cast this debate as an effort to define the wrong of discrimination, to determine what grounds the entitlement to protection and what constitutes unlawful behaviour. An important part of this debate hinges on understanding what is meant by "intent" in this context, in contrast to an effect-based account. As you read these materials, ask yourself what each author (whether academic or judicial) means by "intent to discriminate". What does this reveal about the implicit understanding of the human interest being protected by the prohibition of discrimination. How would we have to understand that interest in order to make sense of an effects-based definition of discrimination.

In tort terms, this issue is traditionally referred to as the "standard of fault" issue, and it may be profitably directly to compare the various standards of fault debated in tort law with the implicit understanding in discrimination law as to what makes discrimination unlawful. To refresh your memory about this debate in the tort context, you may wish to **re-read the excerpts from Holmes, *The Common Law*, and Fleming, *The Law of Torts*, reproduced in E. Weinrib, *Tort Law: Cases and Materials*, Toronto: Emond Montgomery, 1997, pp. 51-55, and 63-68.**